

STATE OF MICHIGAN
COURT OF APPEALS

JOSEPH LOZOWSKI,

Plaintiff-Appellant,

v

ELISE M. BENEDICT and WILLIAM GRAY,

Defendants-Appellees.

UNPUBLISHED

February 6, 2007

No. 271626

Oakland Circuit Court

LC No. 04-055419-CZ

Before: Fort Hood, P.J., and Talbot and Servitto, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants summary disposition. Because res judicata precluded plaintiff's minority shareholder and fraud claims, we affirm.

Plaintiff and defendants were joint shareholders in a corporation. Plaintiff initially filed a complaint against defendants on November 2, 2002, seeking an accounting and equitable relief with respect to the corporation. While the case was pending, a certificate of dissolution for the corporation was filed. Shortly thereafter, the trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(8).

Plaintiff filed the instant action against defendants in January, 2004, alleging that because the corporation was dissolved and he no longer had a derivative action against defendants, he was now bringing an action for not only an accounting and injunctive relief, but also minority shareholder oppression, breach of fiduciary duty, breach of contract and covenant of good faith. In lieu of answering plaintiff's complaint, defendants sought summary disposition under MCR 2.116(C)(5), (7), and (8). The trial court granted defendants' motion, dismissing plaintiff's complaint with prejudice. Plaintiff appealed the ruling and this Court, in *Lozowski v Benedict*, unpublished opinion per curiam of the Court of Appeals, issued February 7, 2006 (Docket No. 257219), affirmed in part, but reversed the circuit court's order to the extent it granted summary disposition of plaintiff's minority shareholder oppression claim under MCR 2.116(C)(8) or based upon res judicata, and remanded the case for further proceedings.

On remand, defendants moved for summary disposition pursuant to MCR 2.116(C)(7) and (10). While the motion was pending, plaintiff filed an amended complaint adding additional counts of fraudulent misrepresentation and silent fraud. The trial court ultimately granted

summary disposition as to plaintiff's claim of minority shareholder oppression and dismissed both it and the newly alleged fraud claims with prejudice. This appeal followed.

We review de novo a trial court's decision on a motion for summary disposition. *Coleman v Kootsillas*, 456 Mich 615, 618; 575 NW2d 527 (1998). When deciding a motion pursuant to MCR 2.116(C)(7), this Court must consider the pleadings as well as any affidavits and documentary evidence submitted by the parties. *Id.*

On appeal, plaintiff argues that the trial court erred in granting summary disposition of his minority shareholder oppression claim on the basis of res judicata because it violated the law of the case doctrine. We disagree.

We review de novo the issue whether res judicata bars a subsequent action, *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004). Res judicata "bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Id.* at 121.

Here, the trial court found that res judicata barred plaintiff's minority shareholder oppression claim in the instant action because the trial court in LC No. 02-045370-CA ("*Lozowski I*") had denied plaintiff's motion to amend his complaint and add the same claim on the merits. Generally, the denial of a motion to amend is not considered a decision on the merits. *DeCare v American Fidelity Fire Ins Co*, 139 Mich App 69, 77; 360 NW2d 872 (1984); *Martin v Michigan Consolidated Gas Co*, 114 Mich App 380, 383; 319 NW2d 352 (1982). However, when a motion to amend is denied because the amendment would be futile, it is a determination that the claims are without merit and is entitled to res judicata impact. *Id.* at 384. The *Lozowski I* lower court determined that amendment of plaintiff's complaint to add a minority shareholder claim would not be justified, i.e., would be futile. This was thus a decision on the merits, and res judicata applies.

Application of the law of the case doctrine to our review on appeal is discretionary, but the general rule is that legal questions decided in an earlier appeal will not be decided differently if the facts remain materially the same. *Grievance Administrator v Lopatin*, 462 Mich 235, 259-260; 612 NW2d 120 (2000); *Grace v Grace*, 253 Mich App 357, 363; 655 NW2d 595 (2002). In the prior appeal, Docket No. 257219, this Court found that defendants failed to show that the lower court dismissed plaintiff's motion to amend on the merits because the trial court did not provide its reasoning in the order denying plaintiff's motion to amend. While the order provided that the court was denying the motion for the reasons stated on the record, the transcript from the hearing on plaintiff's motion was not included with the record on appeal. *Lozowski v Benedict*, unpublished opinion per curiam of the Court of Appeals, issued February 7, 2006 (Docket No. 257219), slip op, pp 4-5. On remand following the prior appeal, defendants moved for summary disposition and provided the transcript, which showed that the *Lozowski I* court had denied plaintiff's motion to amend his complaint to add a minority shareholder claim because there was no evidence that defendants were majority or controlling shareholders and amendment would not be justified. Therefore, the facts on remand were different from the facts this Court considered in the prior appeal, and the law of the case doctrine does not apply. See *Grace*, *supra* at 363. The trial court did not err in granting defendants summary disposition of plaintiff's minority shareholder oppression claim on the basis of res judicata.

Plaintiff next contends that the trial court erred in granting summary disposition of his fraud claims because the dismissal of his motion to amend, without prejudice, cannot constitute a decision on the merits for res judicata purposes. Plaintiff is correct that, generally, a dismissal without prejudice is not an adjudication on the merits. *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 509-510; 686 NW2d 770 (2004). However, as discussed *supra*, the denial of a motion to amend a complaint on the ground that the amendment would be futile constitutes a determination that the claims are without merit and is entitled to res judicata impact. *Martin, supra* at 384.

Plaintiff also maintains that the trial court erred in relying on the *Lozowski I* transcript rather than the order denying his motion to amend the complaint. It is well established that courts speak through their judgments and orders, not their oral statements or written opinions. *Johnson v White*, 430 Mich 47, 53; 420 NW2d 87 (1988); *Stackhouse v Stackhouse*, 193 Mich App 437, 439; 484 NW2d 723 (1992). Plaintiff, however, provides nothing to support his assertion that it is inappropriate to consider a transcript when the trial court's order refers to the transcript. "It is not sufficient for a party 'simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'" *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Failure to properly address the merits of an assertion constitutes abandonment of the issue. *Thompson v Thompson*, 261 Mich App 353, 356; 683 NW2d 250 (2004).

On appeal, plaintiff devotes almost his entire argument to the *Lozowski I* court's reasons for denying his motion to amend his complaint and asserts that the *Lozowski I* court never found the proposed amendment to be futile. Although the *Lozowski I* court never used the word "futile," it stated that it was denying the motion to amend the complaint because the claim would not be justified. Regardless of the words used, the *Lozowski I* court did not believe plaintiff's claim would be successful. Therefore, plaintiff's argument is misplaced. Further, the order denying plaintiff's motion to amend his complaint from *Lozowski I* has not been challenged in this appeal, nor could it have been. Courts have adopted a broad approach to res judicata, holding that it bars "every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Adair, supra* at 123. To determine whether the facts pertinent to both actions constitute a transaction for purposes of res judicata, this Court considers whether the facts are related in time, space, origin, or motivation, and whether they form a convenient trial unit. *Id.* at 125.

Notably, both plaintiff's minority shareholder oppression claim in his proposed first amended complaint in *Lozowski I* and his fraud claims in the instant case alleged a failure to disclose financial dealings between Towsley Ventures, formerly known as University Business Interiors ("the corporation") and Furniture Installation Network, Inc. (FIN) and an improper transfer of assets between the corporation and FIN. Both claims contained assertions regarding payments to FIN for unauthorized invoices, including warehousing fees, and the failure to disclose payment of FIN invoices to the appropriate corporate officers. Both claims alleged that defendants failed to account for all monies paid to FIN. Both claims asserted that defendants failed to control corporate assets and incurred tax penalties. These allegations are thus all related in time, space, origin, or motivation and would form a convenient trial unit. While the fraud

claims contained allegations regarding transfers to University Moving and Storage, but the proposed minority shareholder oppression claim did not contain similar allegations, because both FIN and University Moving and Storage were owned and operated by defendants, the facts are related in motivation and would form a convenient trial unit. Accordingly, the trial court properly granted summary disposition of plaintiff's fraud claims on the basis of res judicata.

As alternate grounds for affirmance, defendants argue that plaintiff's minority shareholder oppression claim lacks merit, plaintiff's fraud claims are derivative claims, and the fraud claims were not pleaded with particularity. Because we have concluded that the trial court properly granted summary disposition of plaintiff's claims on the basis of res judicata, we need not address this issue.

Affirmed.

/s/ Karen M. Fort Hood

/s/ Michael J. Talbot

/s/ Deborah A. Servitto